89-595

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHN M. RATELLE,

Petitioner,

v.

DWIGHT EDWARD MARTIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR.,
Assistant Attorney General
DONALD E. DE NICOLA,
Supervising Deputy Attorney General
DONALD F. ROESCHKE,
Deputy Attorney General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2229

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a motion for self-representation that is made on the eve of trial and that would have delayed the trial proceedings if it had been granted is nevertheless timely as a matter of law unless the state can prove that it was made solely to delay the trial proceedings.

2. Whether a state defendant is procedurally barred from obtaining relief in federal habeas corpus proceedings where he ignored the state's procedural requirement, mandated by the state's highest court, that a motion for self-representation must be made within a reasonable period of time prior to the trial so as not to disrupt the orderly administration of justice.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner John M. Ratelle, respectfully urges that this Honorable Court grant this Petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals for the Ninth Circuit, filed May 22, 1989, affirming the judgment of the United States District Court for the Central

District of California granting a conditional writ of habeas corpus.

OPINIONS BELOW

A memorandum decision of the United States Court of Appeals for the Ninth Circuit of April 2, 1987, remanding the case to the United States District Court for the Central District of California for further proceedings, appears as Appendix A. The subsequent memorandum decision of the Ninth Circuit, filed on May 22, 1989, affirming the district court's conditional granting of the writ, appears as Appendix B. The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc, filed August 10, 1989, appears as Appendix C.

The judgment of the United States District Court for the Central District

of California, filed August 31, 1987, and the report and recommendation in support thereof, appear as Appendix E.

The opinion of the California Court of Appeal, Second Appellate District, Division Two, appear as Appendix F.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on May 22, 1989. (Appendix B.) On August 10, 1989, an order was filed by the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc. (Appendix C.) The period pending the petition for rehearing tolled the period in which the petition for certiorari must be filed. (Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927).) Thus, this petition is being filed timely. (28

U.S.C. § 2101(c).)

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code. Because the within petition is timely filed from the decision of the Ninth Circuit, May 22, 1989, and the order denying the petition for rehearing of August 10, 1989, this Court has jurisdiction to determine questions raised in the prior appeal to the Ninth Circuit arising out of the same litigation. (Mercer v. Theriot, 377 U.S. 152, 153-154 (1964).)

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Respondent was sentenced to state prison for 15 years to life for murder of the second degree, which term was enhanced by two years for use of a firearm during the commission of the offense. (CT 112.)[1/]

The California Court of Appeal,

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1. "CT" refers to the Clerk's Transcript on respondent's state appeal.

Second Appellate District, Division Two, affirmed the judgment of conviction. (Appendix F.) Respondent filed two petitions for writ of habeas corpus in the California Supreme Court. (Docket No. 5, Exhs. B, C.)[2/] The California Supreme Court denied the petitions without citation of authorities. (1985 Official Cal. Adv. Sheets, Vol. 6, Supreme Ct. Mins., p. 618.)

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. The pertinent issue

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2. "Docket No." refers to the designated number of the Clerk's Record on the appeal in the Ninth Circuit. Each document filed in the United States District Court for the Central District of California is entered in a docket sheet in accordance with the sequence in which it is filed in the case. The document retains the same docket number designation in the Ninth Circuit. (See, generally, Rule 28-2.8, Rules of the Ninth Circuit.)

raised in the petition was whether respondent was unconstitutionally denied the right to self-representation where the motion was made on the eve of trial. (Docket No. 1, p. 6.) Petitioner filed a return to the petition for writ of habeas corpus. (Docket No. 5.)

The United States District Court found that the request for self-representation made on the date set for trial was timely as a matter of law because there was nothing in the state record to show that respondent requested self-representation to delay the trial proceedings. The court also concluded that the effect of the delay on the trial proceedings because of the motion for self-representation is not an appropriate legal standard to utilize in evaluating the timeliness for the motion for self-representation. The court also deter-

mined that respondent exercised diligence in requesting self-representation and that the denial of the request for a continuance was thus improper. (Appendix E.)

Following the district court's judgment, the Ninth Circuit held that the request for self-representation was timely as a matter of law unless it was made for the purpose of delay. The court observed that the state courts did not find that the request for self-representation was made to delay the trial proceedings but rather the state appellate court only evaluated the effect of the delay. The court then remanded to the district court on the issue of respondent's request for a continuance. The pertinent portion of the Ninth Circuit's opinion reads as follows:

"Therefore, we remand to the dis-

trict court to decide whether a hearing should be held and, if there was an abuse of discretion, to reissue the writ. If the district court determines there was no abuse of discretion in denying the motion to continue, the district court should decide what impact that has, if any, on *Faretta* error." (Appendix A.)

Upon remand, both parties agreed that an evidentiary hearing was not essential. (Docket Nos. 35-36.) The district court again granted the conditional writ of habeas corpus. (Docket No. 42.) The pertinent portion of the report and recommendation in support of the judgment reads as follows:

"This Magistrate has inquired of petitioner and respondent as to whether they believe this Court

should conduct a hearing. Both parties have indicated that there is no need for a hearing. The Magistrate concurs.

"Assuming that there was a request by petitioner for a continuance, the Magistrate concludes that there was an abuse of discretion by the trial judge in not granting it for the following combination of reasons:

"1. The trial court made no inquiry as to petitioner's reasons for wanting to represent himself.

"2. The trial judge did not inquire of petitioner as to his reason for not being able to proceed immediately (his counsel was not able to proceed immediately either). The judge did not inquire as

to whether petitioner could have proceeded on the next day or just how long a continuance he was seeking, and

"3. The trial did not actually commence until seven days after petitioner had made his request." (Appendix D; Docket No. 38.)

On the appeal, the Ninth Circuit Court of Appeals held that the trial court abused its discretion in denying the continuance. In so ruling, it found that respondent exercised diligence in that the source of his discontent with counsel did not arise until the day of trial and that respondent was prejudiced because the failure to grant the continuance effectively deprived him of the opportunity to exercise the right to represent himself. (Appendix B.)

B. Facts Pertinent to a Determination of this Petition

On November 5, 1980, respondent, with counsel present, was arraigned and pleaded not guilty to murder. (CT 1-2.) On November 26, 1980, a pretrial conference was held. The sheriff was directed to allow respondent to make two phone calls at his own expense. (CT 3.) Several requests for continuances on behalf of the defense were granted. (CT 4-7.) On January 2, 1981, the trial was continued on stipulation of the parties because the witnesses were not available. (CT 8.) On motion of the defense, two further continuances were granted. (CT 9-10.) Then on February 23, 1983, the public defender declared a conflict of interest and new counsel was appointed

to represent respondent. (RT 1-2.)[3]

On April 28, 1981, the date set for trial, defense counsel informed the trial court that respondent indicated a desire to represent himself. The court indicated it would allow respondent to represent himself but that the trial would proceed that day. (Aug. RT 1-2.)[4] However, respondent stated that he was not ready to proceed with the trial. (Aug. RT 3, lines 5-9.) The following pertinent proceedings then transpired:

"THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to repre-

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3. "RT" refers to the Reporter's Transcript on respondent's state appeal.

4. "Aug. RT" refers to the Augmented Reporter's Transcript on the state appeal.

sent himself is untimely because I have no intent of continuing this case.

"THE DEFENDANT: I am letting the court know I [sic] like to represent myself.

"THE COURT: If you are ready to proceed to trial today, you can represent yourself --

"THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

"THE COURT: I have no intent of giving you any time. This case goes back to May 30, 1980. It has been a year, so I have no --

"THE DEFENDANT: It has not been a year. I have been in custody for seven months.

"MR. MASON: We are going to ask

that this matter trial for a few days so we can do a witness check to ascertain --

"THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be what, two, three days." (Aug. RT 3-4.)

The court made the following findings of fact:

"THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday." (Aug.

RT 4, lines 10-15.)

The trial commenced on May 7, 1981. (CT 26.) Respondent was afforded an opportunity prior to the commencement of trial to be heard with regard to his complaints regarding his allegations of ineffective representation or to move for substitution of counsel in that it was noted that there was a Marsden motion that was pending. (RT 3, lines 11-12.) It is common knowledge that such a motion in California refers to People v. Marsden, 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44] (1970), in which it was held that the state defendant is entitled to a hearing on his complaints about counsel or to request substitution of counsel. However, when the trial court stated, prior to the actual testimony, that it was about to consider the motion, respondent personally stated, "I'd like to

withdraw that motion on *Marsden* hearing." (RT 10, lines 9-11.)

When the issue of the denial of the request for self-representation and a continuance was raised in the California Court of Appeal, the court found that "to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice." (Appendix F, p. 7.)

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REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

* * * * * *

ARGUMENT

I

THE DECISION BELOW IS IN CONFLICT WITH MANY STATE COURT DECISIONS AND A CIRCUIT COURT OF APPEALS DECISION AS TO WHAT CONSTITUTES A TIMELY MOTION FOR SELF-REPRESENTATION AND WILL RESULT IN THE DISRUPTION OF THE ADMINISTRATION OF JUSTICE BY AFFORDING STATE DEFENDANTS THE OPPORTUNITY TO DELAY TRIAL PROCEEDINGS UNDULY

The Court of Appeals for the Ninth Circuit held that a request for self-representation is timely as a matter of law if it was made before the jury was empaneled unless the state defendant's purpose was to delay the trial proceedings. (Appendix A, pp. 1-2.) Although the memorandum opinion of the Ninth Circuit is not published, this is a recurring issue in that it is based on

the Ninth Circuit's interpretation of what constitutes a timely motion for self-representation. (See Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985), holding (1) that a request for self-representation is timely as a matter of law unless it was made to secure a delay of the trial proceedings and (2) that the effect of the delay is not a ground to deny self-representation even though the motion was made on the eve of trial. (See, also, Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982).)

The California Supreme Court has addressed the issue on numerous occasions. Recently it summarized the law and held that to be timely, the motion for self-representation must be made within a reasonable time prior to trial and when it is made on the eve of trial, it is left to the trial court's sound

discretion to grant or to deny the motion. The court found that the federal rule that a motion for self-representation made on the eve of trial, unless made to delay the trial proceedings, is timely as a matter of law, to be too rigid. (People v. Burton, 48 Cal.3d 843, 852-854 (1989); see, also, People v. Moore, 47 Cal.3d 63, 69 [252 Cal.Rptr. 494, 762 P.2d 1218] (1988); People v. Windham, 19 Cal.3d 121, 128 [137 Cal.Rptr. 8, 560 F.2d 1187] (1977).) Several other states are in accord with California's holding that a request for self-representation made on the day of trial is not timely as a matter of law but rather whether to grant the motion is left to the discretion of the trial court. (See, for instance, State v. Garcia, 92 Wash.2d 647 [600 P.2d 1010, 1015] (1979); Williams v. State, 655 P.2d

273, 276 (Wyo. 1982); State v. Kender, 21 Wash.App. 622 [587 P.2d 551, 553-554] (1978); State v. Herron, 736 S.W.2d 447, 449 (Mo. 1987).) Further, the Eighth Circuit has held that it is proper to deny a motion for self-representation that was made on the day of the trial. (Parton v. Wyrick, 704 F.2d 415, 416-417 (8th Cir. 1983).)

To allow defendants to await the day of trial to request self-representation can be very disruptive of the orderly administration of justice. Nevertheless, the Ninth Circuit has made it explicit that a showing that the effect of the delay is to disrupt the court proceedings is not a sufficient showing to justify the denial of self-representation that was made on the date set for trial. (Appendix A, pp. 2-3.) This holding clearly encourages defendants to wait

until the date set for trial before requesting self-representation because it is very difficult to show that the motive was to secure a delay of the trial proceedings. Most importantly, the holding of the Ninth Circuit is contrary to this Court's statement in Faretta v. California, 422 U.S. 806, 834, fn. 46 (1975), that the right to self-representation is not a license to fail to abide by relevant rules of procedure. In other words, California has adopted a relevant rule of procedure which requires that state defendants make a motion for self-representation within a reasonable period prior to trial. Where a state defendant, such as respondent herein, has failed to follow that procedure, he has not met the requirements of Faretta for self-representation.

Faretta makes it explicit that the

right to self-representation may not be utilized to disrupt the court proceedings. (Faretta v. California, supra, 422 U.S. at p. 834, fn. 46.) The procedure followed by respondent is most disruptive of court proceedings in that not only did he wait until the day set for trial to request self-representation but he also indicated he was not ready to proceed (Aug. RT 3, lines 5-9), thus necessitating a continuance of undetermined length to effectuate self-representation. Although, as shown, respondent was afforded an opportunity to indicate dissatisfaction with his counsel and thereby show the need for self-representation, he waived his right to do so. Nevertheless, the Ninth Circuit placed the burden on petitioner to show why respondent did not need a continuance, especially to show why respondent

was not diligent and why he did not suffer prejudice. (Appendix B.) This is contrary to state law (People v. Burton, supra, 48 Cal.3d at pp. 852-854) and federal decisional law which places the burden on the state defendant to show prejudicial error in the denial of a request for a continuance. (See the excellent discussion in McFadden v. Cabana, 851 F.2d 784, 788 (5th Cir. 1988).)

Petitioner strongly urges that because of the disruptive effect on the administration of justice that is caused by last minute requests for a continuance and because the person who is requesting the continuance is in the best possible position to set forth his personal reasons for the continuance, the failure to justify the need, first in the trial court, and then in federal habeas

corpus proceedings, should be deemed fatal to his position. Therefore, to prevent needless disruption of court proceedings and to resolve the conflicts between the Ninth Circuit decisional law and that of many of the states and of some of the other circuits, the foregoing conflicts should be resolved by this Court so as to preserve the administration of justice.

II

A HEARING IS NECESSARY TO RESOLVE THE APPARENT CONFLICT OF THE NINTH CIRCUIT DECISION WITH THIS COURT'S DECISIONS MANDATING THAT STATE DEFENDANTS MUST FOLLOW STATE PROCEDURAL RULES AND SAFEGUARDING STATE'S RIGHTS TO ENFORCE THOSE RULES BY INVOKING THE WAIVER DOCTRINE

In 1977, over three years prior to respondent's requesting self-representation (Aug. RT 1-2), the California Supreme Court cemented the procedural requirement that a state defendant must

make a request for self-representation within a reasonable period before trial and that, if he waits until the eve of trial, he then must justify the delay. (People v. Windham, supra, 19 Cal.3d 121, 128.) As shown in the statement of the facts, respondent did not make any attempt to justify the last minute request for self-representation. In fact, when respondent was afforded an opportunity to set forth his reasons for dissatisfaction with his counsel, he waived his right to a hearing on the issue. (RT 10.)

California regularly denies motions for self-representation where the request is made on the eve of trial and where the delay is not justified in the trial court. (See, e.g., People v. Burton, supra, 48 Cal.3d 843, 852-854; People v. Moore, supra, 47 Cal.3d 63, 79; People v.

Windham, supra, 19 Cal.3d at p. 128.) Moreover, in the instant case the motion for self-representation in conjunction with the request for a continuance was denied for the specific reason that it was not timely and because there was no justification for the untimely filing of the motion. (Appendix F.)

In view of the foregoing fact, respondent has waived his right to raise the self-representation issue for the following reasons: (1) Respondent failed to follow state mandated procedures by making a timely request for self-representation. (2) Respondent has not justified the failure to have followed state procedures in that he was afforded ample opportunity to raise the issue in the state trial court but failed to do so. (3) The state reviewing court declined to entertain the issue because

of respondent's default. (4) The California Supreme Court has mandated that requests for self-representation must be made a reasonable period before the trial unless the state defendant justifies before that court the reasons for the delay. Thus, since respondent's failure to have followed state procedures resulted in a procedural default and because he cannot justify his failure to have exercised the opportunity in the state trial court to justify his tardiness in the making of the motion for self-representation, he is procedurally barred from obtaining relief. (Teague v. Lane, ____U.S.____ [103 L.Ed.2d 334, 109 S.Ct. 1060, 1068] (1989).) The application of the waiver doctrine, as set forth herein, is not contrary to Faretta but is in accord with the holding of Faretta which essentially grants the rights to

self-representation only where: (1) the defendant intelligently waived the right to counsel; (2) the defendant unequivocally requested self-representation; and (3) the request was made weeks before the trial. (Faretta v. California, supra, 422 U.S. at pp. 835-836.)

There are divergent views expressed by the states regarding the procedural requirement for the timely assertion of the self-representation claim, especially, where, as here, the state defendant seeks a continuance to secure self-representation. Accordingly, it is crucial that this Court determine the issue of whether the state courts are free to set forth rules relevant to the right to self-representation so as to ensure that the state defendant's exercise of that right does not disrupt the administration of justice.

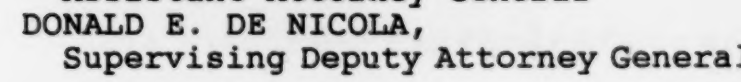
CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: October 5, 1989.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART, Chief Assistant
Attorney General
EDWARD T. FOGEL, JR.
Assistant Attorney General
DONALD E. DE NICOLA,
Supervising Deputy Attorney General



DONALD F. ROESCHKE,
Deputy Attorney General

Attorneys for Petitioner

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 85-6593
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-85-1732-
-vs-	)	RMT(JR)
	)	
DANNY VASQUEZ, Warden,	)	MEMORANDUM
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California Robert M. Takasugi, District Judge, Presiding
Submitted September 23, 1986*

Before: WALLACE, HUG, and KOZINSKI, Circuit Judges.

Warden Vasquez appeals the district court's conditional grant of a writ of habeas corpus. The district court found that Martin was denied his sixth

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* The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P. 34(a).

amendment right to represent himself at trial. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

On April 28, 1981, the date set for trial, Martin's appointed counsel was not ready to proceed with the trial due to another trial. Martin alleges that on that day he learned that two witnesses for his defense were not subpoenaed. Upon his request to represent himself, the state trial court demanded he proceed with the trial that day. Martin's lawyer could not get his case file to Martin until the next day. The trial judge stated that a jury could be selected that day and the rest of the trial could commence after Martin secured the file. Martin said he was not ready to proceed on that day and the trial court denied the request for self-representation. The

trial court ruled that the motion was not timely and that Martin was not prepared to go to trial that day. The trial commenced on May 5, with Martin represented by his appointed counsel. He was subsequently convicted.

We review a district court's issuance of a writ of habeas corpus de novo. Chatman v. Marquez, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 106 S. Ct. 124 (1985).

A defendant has a constitutional right to self-representation at trial. Faretta v. California, 422 U.S. 806, 832 (1975) (Faretta). To preserve his right, a defendant must make a timely and unequivocal request for self-representation. The request is timely, as a matter of law, if made before the jury is impaneled, unless it was made for the purpose of delay. Fritz v. Spalding, 682

F.2d 782, 784 (9th Cir. 1982).

Here, Martin asserted his Faretta right the morning his trial was scheduled to start and before the jury was impaneled. It was, therefore, timely as a matter of law unless it was made for the purpose of delay. Neither the state trial court nor the state appellate court found that Martin's request was made for the purpose of delay. Although Vasquez argues that there was an implied finding to this effect, it is clear that the state appellate court only evaluated whether granting the request would have the effect of delay. Where, as here, there is no state court finding that a request for self-representation was made for the purpose of delay, a district court need not conduct an evidentiary hearing. Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985) (Armant), cert.

denied, 106 S. Ct. 1502 (1986).

The denial of Martin's Faretta claim is inextricably connected to his implicit motion to continue. Although there is no constitutional right to a continuance absent a violation of the fundamental fairness mandated by the fourteenth amendment, we have included the motion to continue with our sixth amendment analysis in a case similar to this one where the "request for a continuance was in essence a request to meaningfully assert the right to self-representation." See Armant, 772 F.2d at 556, 557. We reviewed the denial for abuse of discretion. Id. at 556.

Obviously, we must test for abuse of discretion based upon what the trial judge knew at the time he denied the motion. Cf. id. at 557 (observing that trial judge knew that the defendant

wished to make motions his attorney had not made and call witnesses his attorney had not called). In applying the four prong Armant test for abuse, id. at 556, the district court, in addressing the diligence and "useful purpose of the continuance" prongs, relied on Martin's assertion that his attorney had not subpoenaed two critical witnesses. But nowhere in the record is it demonstrated that the trial judge was made aware of this reason. When Martin requested to represent himself, he gave no reason.

In addressing the prejudice prong of the Armant test, the district court also asserted that the absence of the two witnesses would demonstrate prejudice. Yet, when the case was subsequently tried and Martin was represented, the witnesses were not called. There was no showing that any prejudice resulted from the

failure to call these witnesses. At best, Martin may have shown enough for an evidentiary hearing on the issue.

We reverse and vacate the writ of habeas corpus. Based upon the record before us, we affirm the Faretta error determination. But whether that error requires granting the writ is inseparably connected, on the particular facts of this case, to the denial of the motion to continue the trial. Therefore, we remand to the district court to decide whether a hearing should be held and, if there was an abuse of discretion, to re-issue the writ. If the district court determines there was no abuse of discretion in denying the motion to continue, the district court should decide what impact that has, if any, on the Faretta error. AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 21.

Dwight Martin v. Danny Vasquez, No. 85-6593

HUG, Circuit Judge, concurring and dissenting in part:

I write separately because I would affirm the district court's conditional grant of a writ of habeas corpus.

Martin made an unequivocal request to represent himself. As the majority opinion states, this was timely and there was no state court finding that the request was for the purpose of delay. Thus, Vasquez was entitled to represent himself under Faretta. See Armant v. Marquez, 772 F.2d 552 (9th Cir. 1985), cert. denied, 106 S. Ct. 1502 (1986).

Martin did not move for a continuance nor condition his request for self-representation on the granting of a continuance. This is in contrast to the Armant case where the trial court interpreted the defendant's request as a request for a continuance. On appeal, both the majority and dissenting opinions acknowledged that the defendant made his request for self-representation conditioned upon his request for a continuance. Id. at 557 and 558. Here, the pertinent exchange in the court proceeding was as follows:

> **THE COURT:** Mr. Martin, do you fully understand now that this matter is ready to proceed today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?
>
> **THE DEFENDANT:** Yes, your Honor.

THE COURT: And you are ready to proceed today?

THE DEFENDANT: No, I am not.

THE COURT: Well, I am not going to continue the case.

THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case.

THE DEFENDANT: I am letting the court know I like to represent myself.

Martin did not condition his request to represent himself on the granting of a continuance.1/ He merely responded to

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1/ We have upheld the granting of a writ of habeas corpus where the district judge found the petitioner's pro se request was timely and not conditioned upon the granting of a continuance. Maxwell v. Sumner, 673 F.2d 1031, 1035-36 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982).

the judge's question as to whether he was ready to proceed, stating that he was not. The judge said he was not going to continue the case. Martin then pointed out that he had merely responded to the judge's question as to whether he was ready to proceed that day. It is important to note that Martin had not conditioned his request to represent himself; in fact, he had not even requested a continuance. It was the judge who refused to let him represent himself if he did not acknowledge that he was ready to proceed that day.

Thus, Martin had a constitutional right to represent himself, which was timely made, and there was no finding that it was for the purpose of delay. The issue before us on appeal is whether he was denied that right. It is clear that he was. Had he been permitted to

represent himself and had he requested a continuance and been denied that continuance, then that would pose a different issue for us to resolve; or had he conditioned his request to represent himself on the granting of a continuance, as in Armant, we would then have to inquire into the necessity for the continuance.

I do note that if that were the question before us, I would have no difficulty in finding that it was patently an abuse of discretion under the authority of United States v. Flynt, 756 F.2d 1352 (9th Cir. 1984) to fail to grant at least the seven-day continuance granted to his attorney. The need for a continuance to obtain the file (which his attorney had not even brought to court that day) and prepare himself to take over his defense is so obvious that the need to express specific reasons seems

superfluous. The fact that a seven-day continuance was, in fact, granted obviates any argument based on inconvenience to the court from the seven-day delay.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 87-6424
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-85-1732
v.	)	
	)	
DANNY VASQUEZ, Warden,	)	MEMORANDUM*
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court for the Central District of California Robert M. Takasugi, District Judge, Presiding

Argued and Submitted: May 4, 1989
Pasadena, California

Before: SNEED, REINHARDT, and BRUNETTI, Circuit Judges

Warden Vasquez appeals the grant of a writ of habeas corpus. We affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

On April 28, 1981, the scheduled date of his murder trial, Martin informed the court that he was displeased with the representation provided by counsel. Appellee asserted that he had just learned that counsel had failed to subpoena two crucial defense witnesses. Martin then claimed his Faretta right to self-representation. The trial court denied him that right, ruling that the motion was untimely. The court also found that "Martin was not prepared to go to trial that day." Memo. Dispo. at 2. The court ordered the case to trail defense counsel's other case, and the trial commenced seven days later.

Martin sought a writ of habeas corpus in federal court. The district court issued the writ, and the government appealed. In an unpublished memorandum, we held that Martin's request to repre-

sent himself was not made for the purpose of delay and was timely as a matter of law. We affirmed the determination of Faretta error. However, we remanded the case to the district court to determine whether the trial court had abused its discretion in denying Martin's implicit motion for a continuance. On remand, both sides declined to introduce any further evidence. The district court, adopting the findings and recommendations of the magistrate, held that the trial court had abused its discretion, and the government appealed for the second time.

In considering the denial of a motion for a continuance, we look to four factors: the degree of diligence shown by the defendant; the usefulness of the continuance to the defendant; inconvenience to the court, witnesses, and parties; and prejudice to the defendant.

Armant v. Marquez, 772 F.2d 552, 556-57 (9th Cir. 1985), cert. denied, 106 S. Ct. 1502 (1986).

We agree with the district court that the factors in this case required a continuance. First, as evidenced by the fact that the case did not start for seven more days, it is apparent that there would have been no substantial inconvenience to the court or to the government as a result of affording the defendant a reasonable delay. Second, on the record before us (and bearing in mind that it is uncontested that no improper purpose underlay appellee's request), appellee exercised reasonable diligence in requesting the right to self-representation. Concededly, the source of his discontent with counsel did not arise until the day of trial. Third, the continuance would have been useful since it

would have permitted Martin to obtain the case file (which was not even in court on the day of trial) and prepare his defense. As noted earlier, we have previously concluded that Martin was not prepared to go to trial on the day in question. Finally, the defendant was prejudiced since the failure to grant a continuance effectively deprived him of the opportunity to exercise his requested constitutional right to self-representation. Id. at 557. In Armant, we strongly indicated that this was sufficient. Id. Moreover, Martin alleges that granting the continuance would have enabled him to present two witnesses at trial who might have substantially aided his defense. The government failed to seek an evidentiary hearing at which it could challenge any of appellee's claims. In light of all of the above, we agree

with both the district court and the magistrate that the trial court abused its discretion in denying the continuance.

The grant of the writ of habeas corpus is AFFIRMED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 87-6424
Petitioner-Appellee,	)	D.C. No. CV-85-1732
v.	)	
DANNY VASQUEZ, Warden,	)	O R D E R
Respondent-Appellant.	)	

Before: SNEED, REINHARDT, and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) JUDGMENT GRANTING A CONDITIONAL WRIT OF HABEAS CORPUS

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

IT IS ADJUDGED that:

1. Petitioner was convicted by the State of California in violation of the Constitution of the United States.

2. The petitioner is entitled to a writ of habeas corpus from this Court, and that the writ will issue unless the State of California shall, within 60 days from the date of the Judgment becomes

final, institute proceedings to retry the petitioner.

3. The Court retains full jurisdiction of the case to modify, amend and enforce the Judgment.

DATED: 31 AUG 1987

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C.§636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached Report and Recommendation of the Magistrate, the objections, and approves and adopts the Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that Judgment be entered granting a conditional writ of habeas corpus.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Reports and Recommendations

and the Judgment by United States mail on the petitioner and the Office of the Attorney General for the State of California.

DATED: 31 AUG 1987

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) FINAL REPORT AND RECOMMENDATION

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C.§636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On August 5, 1987, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the

parties, together with copies of the Magistrate's Report and Recommendation.

Objections were filed on August 17, 1987.

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and 2) directing that Judgment be entered granting a conditional writ of habeas corpus.

DATED: August 24, 1987.

JOSEPH REICHMANN
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) REPORT AND RECOMMENDATION ON A WRIT OF HABEAS CORPUS BY A STATE PRISONER

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C.§636 and General Order 194 of the United States District Court for the Central District of California.

This matter was remanded by the U.S. Court of Appeals for the Ninth Circuit for this "district court to decide whether a hearing should be held and, if there was an abuse of discretion, to re-issue the writ. If the district court

determines there was no abuse of discretion in denying the Motion to Continue, the district court should decide what impact that has, if any, on the Faretta error." (See Attachment A).

This Magistrate has inquired of petitioner and respondent as to whether they believe this Court should conduct a hearing. Both parties have indicated that there is no need for a hearing. The Magistrate concurs.

Assuming that there was a request by petitioner for a continuance, the Magistrate concludes that there was an abuse of discretion by the trial judge in not granting it for the following combination of reasons:

1. The trial court made no inquiry as to petitioner's reasons for wanting to represent himself,
2. The trial judge did not inquire

of petitioner as to his reason for not being able to proceed immediately (his counsel was not able to proceed immediately, either). The judge did not inquire as to whether petitioner could have proceeded on the next day or just how long a continuance he was seeking, and

3. The trial did not actually commence until seven days after petitioner had made his request.

The Magistrate finds an abuse of discretion and THEREFORE RECOMMENDS that this Court re-issue the writ.

DATED: August 5, 1987.

JOSEPH REICHMANN
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) JUDGMENT GRANTING A CONDITIONAL WRIT OF HABEAS CORPUS

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

IT IS ADJUDGED that:

1. Petitioner was convicted by the State of California in violation of the Constitution of the United States.

2. The petitioner is entitled to a writ of habeas corpus from this Court, and that the writ will issue unless the State of California shall, within 60 days from the date ~~of~~ this Judgment becomes

final, institute proceedings to retry the petitioner.

3. The Court retains full jurisdiction of the case to modify, amend and enforce the Judgment.

DATED: Nov 10, 1985

ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) FINAL REPORT AND RECOMMENDATION

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C.§636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On October 28, 1985, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the

parties, together with copies of the Magistrate's Report and Recommendation.

Objections were filed on November 14, 1985.

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and (2) directing that Judgment be entered granting the petition.

DATED: November 15, 1985.

JOSEPH REICHMANN
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN, Petitioner, v. DANNY VASQUEZ, WARDEN, Respondent.	NO. CV 85-1732-RMT (JR) REPORT AND RECOMMENDATION ON A WRIT OF HABEAS CORPUS BY A STATE PRISONER

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C.§636 and General Order 194 of the United States District Court for the Central District of California.

THE PETITION

Dwight Edward Martin petitions the Court for a writ of habeas corpus. In his petition, Martin alleges that his Sixth Amendment right to self-representation was violated by the California

Superior Court. After requesting to represent himself, Martin sought a continuance in order to prepare his defense. Because he was not ready to proceed immediately, the Court held that his motion was untimely.

FACTUAL AND PROCEDURAL BACKGROUND

On or about November 5, 1980, Martin was charged in an information with murder (C.T.p.1). On December 5, 1980, the cause was called for trial and was continued for further motions (C.T.p.4). Thereafter, there were numerous continuances of the trial (C.T.pp.7-18). Trial was rescheduled for April 28, 1981.

On the morning of the trial, the following exchange took place:

> "THE COURT: All right. The court will call the matter of Dwight Edward Martin. The record will indicate the defen-

dant is present with counsel; People are present.

MR. GOLDSTEIN: (Martin's attorney) Your Honor, I'd indicate for the record that I had a discussion with Mr. Martin this morning earlier. Today is the day set for trial.

He has indicated a desire to represent himself in this matter. I will indicate to the court that I have explained to him the hazards of so doing. It is a 187. But it is Mr. Martin's desire to represent himself in this matter.

THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will

accommodate you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: But I want you to understand that we will proceed to trial in this matter today. If you want to try to represent yourself, you are welcome to do it, but I think you are a complete idiot.

I will not give you one hand whatsoever. I will have to treat you the same way I treat Mr. Grodin who has been an attorney for a great number of years and Mr. Mason -- who will be trying this?

MR. MASON (prosecutor): I think Mr. Grodin or myself.

THE COURT: -- who have tried a great number of cases. So as

long as you completely understand the danger in which you are doing. As far as I am concerned, you will absolutely be committing suicide, but that will be up to you.

THE DEFENDANT: Thank you.

MR. GOLDSTEIN: Your Honor, may I indicate that I am currently engaged in Department 121, Because of that, I didn't feel this matter would go to trial today.

I have advised Mr. Martin that I will bring him my entire file -- if that's his desire -- I will bring it to him tomorrow.

What I am indicating is I don't have the file with me today, and I think Mr. Martin

would need that file. I probably could arrange to have it for him today. I could have it brought down, whatever the court's desire is.

THE COURT: I assume he wouldn't need the file to select the jury today and give it to him tomorrow. I think he is completely insane to do it.

MR. MASON: I don't understand counsel. Today is the date of trial. He didn't bring the file with him.

MR. GOLDSTEIN: As I indicated, I am engaged in a jury trial. I am giving my closing argument at 10 o'clock.

THE COURT: Mr. Martin, do you fully understand now that this matter is ready to proceed

today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you are ready to proceed today?

THE DEFENDANT: No, I am not.

THE COURT: Well, I am not going to continue the case.

THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is

untimely because I have no intent of continuing this case.

THE DEFENDANT: I am letting the court know I like to represent myself.

THE COURT: If you are ready to proceed to trial today, you can represent yourself --

THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

THE COURT: I have no intent of giving you any time. This case goes back to May 30th, 1980. It has been a year, so I have no --

THE DEFENDANT: It has not been a year. I have been in custody for seven months.

MR. MASON: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

MR. GOLDSTEIN: It should be over by Wednesday.

THE COURT: By Wednesday.

MR. MASON: Trail this until Wednesday --

MR. GOLDSTEIN: Could that trail -- I'm sorry -- until Thursday, Your Honor? It should end late Wednesday, I

would believe.

THE COURT: All right. The court will find the defendant's motion to represent himself as untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

MR. MASON: We are not going to select the jury until we have assurances that all the witnesses are available.

THE COURT: All right. The matter will go on trailing

status then. Thank you very much."

The trial commenced on May 5, 1981, and Martin was convicted of second degree murder with use of a firearm on May 14, 1981. He was sentenced to fifteen years to life plus two years gun enhancement. His conviction was affirmed by the California Court of Appeal, Second District. The California Supreme Court denied review. Martin then twice petitioned the California Supreme Court for a writ of habeas corpus. Each time the petition was denied without a hearing. Martin now petitions this Court for a writ of habeas corpus under 28 U.S.C.§2254.

THE RIGHT OF SELF-REPRESENTATION

The constitutional right of self-representation, recognized in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.562 (1975) must be timely

asserted. Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). "A defendant must however have a last clear chance to assert his constitutional right before meaningful trial proceedings have commenced. Thus, a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." Id.

Here Martin asserted his Faretta right on the morning of trial, before the jury was empaneled. It was, therefore, timely as a matter of law, unless it was made for the purpose of delay. Armant v. Marquez, Slip Op. No. 84-5672 (9th Cir., filed 9/24/85); Fritz, 682 F.2d at 784.

In Fritz, the state appellate court found that the petitioner's motion to represent himself was "a tactic" to delay his scheduled trial. The district court made no finding of purpose to delay, but

relied solely on the effect of the delay and denied the requested writ. The Ninth Circuit vacated the order of the district court and remanded for an evidentiary hearing to determine whether Fritz' motion to proceed pro se was made as a tactic to delay the start of trial.

In Armant, the Ninth Circuit held that the district court was correct in not considering the petitioner's purpose for requesting to proceed pro se because, in contrast to Fritz, the state appellate court did not find that the motion was a tactic to delay trial.

This case is similar to Armant. Neither the trial court nor the state appellate court found that Martin's request to represent himself was for the purpose of delay. Instead, the state appellate court evaluated whether granting the motion would have the effect

of delay and concluded that "to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice."

In both Fritz and Armant, the Ninth Circuit has clearly held that the "effect of delay" is not the appropriate legal standard to use in evaluating the timeliness of a motion to proceed pro se. "Delay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation." Fritz, 682 F.2d at 784; Armant, supra.

Because there is no suggestion in the record that Martin made his request for the purpose of delay, under Armant, there is no need for an evidentiary hearing and Martin's request was timely as a matter of law. He was therefore entitled to exercise his Sixth Amendment

right to represent himself.

DENIAL OF CONTINUANCE

The remaining issue in this case is whether the court's denial of Martin's continuance motion under these circumstances was an abuse of discretion. "An abuse of discretion will be found if after carefully evaluating all relevant factors, we conclude that the denial was arbitrary or unreasonable." Armant v. Marquez, Slip Op., No. 84-5672 (9th Cir. filed 9/24/85); United States v. Flynt, 756 F.2d 1352, 1358 (9th Cir. 1985).

In Flynt, the Ninth Circuit listed four factors that appellate courts have considered when reviewing denials of requests for continuances. These factors are reiterated in Armant. "First, we look to the degree of diligence by the appellant prior to the date beyond which the continuance is sought. Second, we

consider whether the continuance would have served a useful purpose if granted. Third, we weigh the inconvenience that granting the continuance would have caused the court or the government. Fourth, we look to the amount of prejudice suffered by the appellant. These factors must be considered together, and the weight given to any one may vary from case to case. At a minimum, however, in order to succeed the appellant must show prejudice resulting from the court's denial." Armant, supra.

DILIGENCE

Martin first requested permission to represent himself on the morning of his trial. The reason for his motion to proceed pro se was that his defense counsel had failed to subpoena two witnesses Martin believed could corroborate his claim of self-defense. Petitioner

claims that it was not until the day of the trial that he was informed that these two witnesses had not been subpoenaed. Thus, he had had no cause to consider self-representation up to this point. Under these circumstances, Martin exercised adequate diligence in asserting his right to represent himself. He could not "reasonably be expected to have made the motion at an earlier time." Fritz at 785.

USEFULNESS OF THE CONTINUANCE

Because it was not until the day of the trial that Martin learned his attorney had not subpoenaed the two witnesses he deemed to be crucial, he was unprepared to defend himself immediately. A continuance, if granted, would have served a useful purpose. Martin would have had a chance to secure his witnesses and to prepare his defense. "In fact, if

granted, the continuance would have allowed for the exercise of a right guaranteed by the United States Constitution." Armant, supra.

INCONVENIENCE

The record indicates that granting Martin's request for a continuance would have resulted in little, if any, inconvenience to the court or to the prosecution. The court was willing to let the matter trail for several days so that the prosecution could make a witness check and defense counsel could finish another trial. Subsequently, rescheduling was already required. Thus, the third factor mitigates strongly in Martin's favor.

PREJUDICE

The final factor to be considered is the prejudice suffered by Martin because of denial of the continuance. It is clear that Martin felt he could defend

himself against the murder charge on the ground that he acted in self-defense. Although he had identified these witnesses, he needed time to locate them and to ascertain the usefulness of their testimony. Thus, the result of the court's refusal to grant the continuance was to deprive him of testimony potentially effective to his defense.

CONCLUSION

Like Armant, Martin "made an unequivocal, timely request to represent himself, and there was no suggestion of a purpose to delay." Armant, supra. He suffered prejudice as a result of the trial court's decision to deny the continuance, and the other three factors we have discussed also weigh in Martin's favor. Thus, the denial of a continuance under the circumstances of this case would be an abuse of discretion by the

trial judge.

The burden is on the prosecution to prove beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979). It is settled in this circuit that an error is prejudicial if "there is a reasonable possibility that the error materially affected the verdict." United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977). The question is not whether the jury could have found Martin guilty on the evidence presented to it. The central issue is whether the prosecution has sufficiently demonstrated that, because of the strength of its case, the error did not beyond a reasonable doubt materially affect the jury's decision. Hinman v. McCarthy, 676 F.2d 343, 349-

351 (9th Cir. 1982).

In the instant case, the denial of Martin's request for a continuance effectively denied him the opportunity of presenting his claim of self-defense to a murder charge. A reasonable possibility exists that this improper denial affected the outcome of the case against him.

Under the compulsion of Fritz and Armant the writ must be granted. IT IS THEREFORE RECOMMENDED that this Court issue an Order granting the petition.

DATED: October 28, 1985

JOSEPH REICHMANN
United States Magistrate

APPENDIX F

2 Crim.

No. 40292

(Super.Ct.No. A359646)

COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

VS.

DWIGHT EDWARD MARTIN,

Defendant and Appellant.

O P I N I O N

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	) 2 CRIM. NO.
	) 40292
Plaintiff and Respondent,	)
	)(Super.Ct.No.
v.	) A359646)
	)
DWIGHT EDWARD MARTIN,	)
	)
Defendant and Appellant.	)
	)

Dwight Martin appeals from the judgment entered following his conviction by jury of second degree murder (Pen. Code, §§ 187, 189). He contends: "I. The trial court erred in denying the clergyman-penitent privilege. II. The trial court erred in failing to order and review a probation report before sentencing. III. The trial court erred in failing to allow appellant to represent

himself."

Considered in accordance with the standard for appellate review (People v. Johnson (1980) 26 Cal.3d 557, 562), the evidence established that in the evening of May 30, 1980, appellant and the victim were sharing "Sherm" cigarettes in an apartment where appellant lived with Joanne, who was visiting Mrs. Gladys Harrell in another apartment in the building. Mrs. Harrell heard "a blast like a sonic boom," and Joanne ran downstairs. A few moments later, Joanne returned and told Mrs. Harrell that appellant "'has shot a man and he's dead; got two holes in him.'" Shortly thereafter, Mrs. Harrell saw Joanne leave the building with appellant, who was carrying a gun. Appellant and Joanne proceeded to Rose Jordan's home, and he left the gun there.

Appellant and Joanne then went to the home of Larry Hargrew, an associate minister of the Bethany Baptist Church. Appellant asked Hargrew to take him to the Los Angeles Greyhound Bus Station. At the station, just before appellant got on a bus, he told Hargrew that he shot a friend who threatened him while they were sharing "Sherm" cigarettes.

Appellant was arrested two months later in Nashville, Tennessee, at which time Joanne told the arresting officer that appellant had killed a man while he was "Shermed."

Appellant testified in substance that a dispute arose as to the sharing of the Sherm cigarettes among himself, the victim, and one Elijah; and he shot the victim when the victim threatened him with a skillet.

When called as a witness by the

People, Hargrew refused to testify, asserting the clergyman-penitent privilege. (Evid. Code, § 1032.) At a hearing of the privilege issue outside the presence of the jury, Hargrew testified that he is an ordained minister of the Baptist Church and an "ex-con" himself who helped appellant straighten out his life.[1/] To support his claim of privilege he

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1. The judge stated that he himself was raised in the Baptist Church and knew of no tenet of the Baptist religion that a clergyman received confidential confessions as do Catholic priests. Hargrew testified that he was aware of that distinction. Then the judge asked whether there was a tenet providing for a Baptist clergyman to accept a confession and give forgiveness. Hargrew answered: "A I don't remember accepting a confession. Q What? A I don't remember accepting any confession and I know I don't deserve the right to forgive anybody of anything. [¶] I am nothing but another ex-convict who has straightened out his life. [¶] That's where I was coming from when I talked to Silky [appellant]; from my past experience. [¶] That's what we had in common."

produced a book entitled "The New Directory For Baptist Churches," which included tenets of the church. He particularly emphasized tenet 7.[2/]

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2. Tenet 7 was read into evidence as follows: "'Civil governments, rulers, and magistrates are to be respected and in all temporal matters [sic] but not contrary to conscience and the word of God is to be obeyed but they have no jurisdiction in spiritual concerns and have no right of dictation to control or interference with matters of religion but are bound to protect all good citizens in the peaceful enjoyment of their religious rights and privileges. [¶] No organic union of church and State can or should be tolerated but entire separation maintained. The church should neither ask for nor accept support from civil authority since to do so would imply the right of civil dictation and control. [¶] This appointed religion belongs to those who profess it.' . . . 'Whence does a minister derive his authority for the exercise of ministerial functions for preaching, administering the ordinances and other perogatives? For no man taketh this honor unto himself. [¶] Whence is it then? Not from the church for no church holds any self any such authority to bestow. Not from a counsel, since counsels possess no ecclesiastical authority. Not from the state for the state has no right of interference in matters

After reviewing the tenets and testimony, the trial court ruled that there was no privilege, expressly finding that (1) the primary purpose of appellant's going to Hargrew was to obtain a ride to the bus station, not for any penitential communication or confession, and (2) the tenets read into evidence do not come within the penitential communication privilege provided for in Evidence Code section 1032, which provides as follows: "As used in this article, 'penitential communication' means a

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of fate, competence, and conscience, and possesses no control over or authority in ecclesiastical affairs. [¶] The minister therefore derives his credentials as a preacher of righteousness and the right to minister as a priest in spiritual services from no human source unto all individuals but directly from Christ, the great head of the Church by the wisdom and endowment of the Holy Spirit. [¶] He who calls and deals and authorizes he sends forth his heralds with authority to preach the Gospel to the end of the age.'"

communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret."

Appellant unpersuasively urges that the trial court erred in denying the clergyman-penitent privilege. As the trial court properly found, appellant's purpose in communicating with Hargrew was to obtain a bus ride out of town, not to confess and receive absolution. Moreover, neither Hargrew's testimony nor the tenets established that he was a "clergyman who, in the course of the discipline or practice of his church, denomination,

or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communication secret." (Evid. Code, § 1032. See People v. Johnson (1969) 270 Cal.App.2d 204, 208; Simrin v. Simrin (1965) 233 Cal.App.2d 90, 94; and generally People v. Thompson (1982) 133 Cal.App.3d 419, 425-427, and "Communication to Clergyman as Privileged" 71 A.L.R. 3d 794.)

In addition, of course, the basic facts in this case were not disputed and Hargrew's evidence was not only redundant to that which was otherwise produced, it was consistent with the defense theory as developed by appellant in his own testimony. Therefore, if any error occurred in its receipt, it was harmless beyond any doubt.

Equally unavailing is appellant's contention that despite his express waiver of his right to a probation report the court nonetheless erred in failing to order one before honoring his request for immediate sentencing. Penal Code section 1203, subdivision (b), mandates such a report only where a convicted felon "is eligible for probation." Since here the jury found appellant guilty of a murder in which he had used a firearm within the meaning of Penal Code section 1203.06, subdivision (a)(1)(i), he was not eligible for probation. (See People v. Bradley (1981) 115 Cal.App.3d 744, 753.) Of course, a court always has the discretion to order such a report (Pen. Code, § 1203, sudb. (c). However, in this instance we find no abuse of that discretion in light of appellant's informed demands, notwithstanding the fact he

insisted upon them against the advise of counsel.

Contrary to appellant's final contention, the trial court did not err in denying his request to represent himself. Appellant first made such request after the case had been called for trial, thus failing to invoke his right to proceed in propria persona within a reasonable time prior to commencement of trial. (People v. Windham (1977) 19 Cal.3d 121, 128.) Moreover, after the court had expressed its inclination to grant his request, appellant stated that he was not ready to proceed. Therefore, to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice. The court did not abuse its discretion in denying the belated request. (See In re Gary U. (1982) 136 Cal.App.3d 494, 499.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

_____, J.
GATES

We Concur:

_____, P.J.
ROTH

_____, J.
BEACH

DECLARATION OF SERVICE BY MAIL

JOHN M. RATELLE v.
Re: DWIGHT EDWARD MARTIN,

Ninth Circuit No. 87-6424

I, Felipe Fulgencio, declare that I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served three copies of the attached

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

on each of the following, by placing in an envelope addressed as follows:

Dwight Edward Martin, C34053
Richard J. Donoboan Correctional
Facility 1-3-L206
480 Alta Road
San Diego, CA - 92179

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Each said envelope was then, on OCT 10 1989 sealed and deposited in the United States Mail at Los Angeles, California, the county in

which I am employed, with the postage thereon fully prepaid.

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCT 10 1989 at Los Angeles, California.

Felipe Fulgencio
Declarant

DFR:dld
LA89US0003

ORIGINAL

No. 89-595

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHN M. RATELLE, WARDEN

Petitioner,

vs.

DWIGHT EDWARD MARTIN,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAUL M. FERSTER
Attorney at Law
1880 Century Park East
Suite 304
Los Angeles, CA 90067

Telephone: (213) 203-0599

Attorney for Respondent

34pp

QUESTIONS PRESENTED

1. Whether a motion for self-representation that was necessarily made on the eve of trial for a good cause which was not made known to the court because the court summarily denied the motion without inquiry, and which was not explicitly conditioned upon a request for a continuance, although a request for a continuance was made, should have been granted where neither the appointed defense counsel nor the prosecutor was ready to proceed, and where the court ultimately continued the case for seven days to permit them to become ready.

2. Whether relief in federal habeas corpus proceedings is available to a state defendant where the state trial court failed to make the necessary inquiry mandated by the state's highest court pursuant to state procedures for evaluating the timeliness of a motion for self-representation and thereby precluded the defendant from making the showing that the state high court requires.

3. Whether a true difference exists between the California rule and the federal rule for assessing the timeliness of a motion for self-representation, or merely a distinction without a difference.

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TABLE OF AUTHORITIES

No. 89-595

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOHN M. RATELLE, WARDEN

Petitioner,

vs.

DWIGHT EDWARD MARTIN,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

This case comes before the Court on a Petition by John M. Ratelle, Warden, for a Writ of Certiorari. At issue is a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment by the United States District Court for the Central District of California granting a conditional Writ of Habeas Corpus to the Respondent, a California state prisoner. The conditional Writ was granted because the District Court found that the Respondent had been unconstitutionally denied his right to self-representation by the state trial court.

STATEMENT OF THE CASE

A. Summary of State Court Proceedings Prior to April 28, 1981

An information charging the Respondent with violation of Penal Code Sec. 187, murder, on or about May 30, 1980, was filed in the Los Angeles County Superior Court on November 5, 1980 (C.T. 1)[1/]. Respondent was arraigned on the information on November 5, 1980, the public defender was appointed to represent him, and the case was set for trial setting on December 5, 1980

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1. "C.T." refers to the Clerk's Transcript in Respondent's state appeal.

(C.T. 2). Thereafter, there were nine continuances to April 28, 1981. Of these, six were requested by the public defender for a total of 86 days (C.T. 4-5, 7, 9-14), one was requested by the District Attorney for a total of 14 days (C.T. 6), one was stipulated between the parties for a total of 3 days (C.T. 8), and one was at the request of appointed private defense counsel Goldstein for a total of 41 days (C.T. 16).

The original trial date was set only 30 days after arraignment (C.T. 1,2). The single continuance, prior to April 28, 1981, granted petitioner's appointed private counsel (C.T. 14) had been anticipated by the trial court on the day it made the appointment (R.T. 1, lines 19-24)[2]. No continuances had been sought by petitioner as a pro se. From the time the information was filed until the Respondent made his Faretta[3] motion on April 28, 1981, a total of 174 days (48% of one year) had passed.

B. The April 28, 1981 State Court Proceedings

Immediately upon the case being called on April 28, 1981, in the state trial court, petitioner's counsel, Mr. Goldstein, advised the court that petitioner had requested to represent himself (Aug. R.T. 1, lines 13-19)[4]. The following dialogue took place:

> MR. GOLDSTEIN: Your Honor, I'd indicate for the record that I had a discussion with Mr. Martin this morning earlier. Today is the day set for trial.
>
> He has indicated a desire to represent himself in this matter. I will indicate to the court that I have explained to him the hazards of so doing. It is a 187. But it is Mr. Martin's desire to represent himself in this matter.

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2. "R.T." refers to the Reporter's Transcript in the Respondent's state court appeal.

3. Faretta v. California 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (1975)

4. "Aug. R.T." refers to the Augmented Reporter's Transcript of the hearing of April 28, 1981 in Respondent's state appeal.

THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will accommodate you.

THE DEFENDANT: Thank you, Your Honor.

(Aug. R.T. 1, lines 13-23.)

The Court then proceeded to advise the Respondent that the case would go to trial that day, and that the court would "not give [him] one hand whatsoever," intending to treat him instead as the attorneys would be treated (Aug. R.T. 1-2, lines 24-9).

Mr. Goldstein advised the court that he was then still engaged in another jury trial and had not brought petitioner's case file with him because he didn't think the case would go to trial that day. He expressed his opinion that petitioner would need the file in order to proceed (Aug. R.T. 2, lines 10-19). He stated he could get the file to the Respondent that day, and the court expressed the opinion that the Respondent could begin with jury selection without the file (Aug. R.T. 2, lines 13-21). The following exchange then took place between the Court and the Respondent.:

THE COURT: Mr. Martin, do you fully understand now that this matter is ready to proceed today, but that this matter would simply trail that [Mr. Goldstein's other case], start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you are ready to proceed today?

THE DEFENDANT: No, I am not.

THE COURT: Well, I am not going to continue the case.

THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case.

THE DEFENDANT: I am letting the court know I [sic]

like to represent myself.

THE COURT: If you are ready to proceed to trial today, you can represent yourself --

THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

THE COURT: I have no intent of giving you any time. It has been a year, so I have no --

THE DEFENDANT: It has not been a year. I have been in custody for seven months.

MR. MASON [the Deputy District Attorney]: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

MR. GOLDSTEIN: It should be over by Wednesday.

THE COURT: By Wednesday.

MR. MASON: Trail this until Wednesday --

MR. GOLDSTEIN: Could that trail -- I'm sorry -- until Thursday, Your Honor? It should end late Wednesday, I would believe.

THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

MR. MASON: We are not going to select the jury until we have assurances that all witnesses are available.

THE COURT: All right. The matter will go on trailing status then. Thank you very much.

(Aug. R.T. 2-4, lines 27-21.)

C. Subsequent State Trial Court Proceedings.

The trial finally got underway with jury selection on May 5, 1981 (C.T. 22), some seven days after petitioner had originally stated his desire to represent himself and had answered the court that he was not ready to proceed. The jury returned its verdict of guilty of murder on May 15, 1981 (C.T. 110). Respondent was sentenced to state prison for 15 years to life for murder of the second degree, with a two year enhancement for use of a firearm (C.T. 112.)

D. Proceedings in the United States District Court and The United States Court of Appeals

Respondent believes that the Petitioner has adequately and fairly set forth the procedural history of the case in the United States Courts in its Petition, as augmented by the Appendices annexed thereto, and the Respondent will rely thereon.

* * * * * * * * * * * * * *

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

* * * * * * * * * * * * * *

SUMMARY OF ARGUMENT

1. The decision below is not in substantial conflict with state and federal decisions such that certiorari is either necessary or advisable.

2. There is no conflict between the Ninth Circuit Court of Appeal's decision herein and this Court's pronouncement that state defendants must follow state procedural requirements where constitutionally acceptable.

3. The state trial record is so incomplete and confusing that this would be a very poor case through which to announce any rule of law.

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ARGUMENT

I

THE DECISION BELOW IS NOT IN SUBSTANTIAL CONFLICT WITH STATE COURT DECISIONS AND ANOTHER CIRCUIT COURT OF APPEAL ON WHAT CONSTITUTES A TIMELY MOTION FOR SELF-REPRESENTATION SUCH THAT CERTIORARI IS NECESSARY OR ADVISABLE, NOR WILL THE DECISION BELOW RESULT IN A DISRUPTION OF THE ADMINISTRATION OF JUSTICE.

A defendant in a criminal case has a right to represent himself under the Sixth Amendment to the United States Constitution. Faretta v. California, supra., 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (1975). Petitioner complains that the 9th Circuit Court of Appeals' rule that a motion for self-representation made prior to jury selection, unless made to delay the trial proceedings, is timely as a matter of law[5/], is too rigid, citing People v. Burton, 48 Cal.3d 843, 258 Cal.Rptr. 184 (1989), People v. Moore, 47 Cal.3d 63 [252 Cal.Rptr. 494, 762 P.2d 1218] (1988), and People v. Windham, 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187] (1977). The Petitioner chooses the language of the California Supreme Court in Burton very selectively. In fact, that Court spent a great deal more time pointing out the similarities between the California and federal rules than citing differences. Thus, the full quote of the Court follows:

> The federal rule, though it calls motions timely until the jury is impaneled, may in practice differ little from our own rule. It is within the court's discretion to deny a motion made before the jury is impaneled if the court finds the motion is made for the purpose of delay. (Fritz v. Spalding, supra., 682 F.2d 782, 784.) The fact that the granting of the motion wil cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be strong evidence of a purpose to delay. (Ibid.; see also Robards v. Rees, supra, 789 F.2d 379, 383-384 [motion for continuance alone may justify denial of Faretta motion].) In most of the cases finding a motion timely as a matter of law, no continuance would have been necessary. [Citations.] In the instant case, although the motion

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5. Fritz v. Spalding (9th Cir. 1982), 682 F.2d 782, 784, Armant v. Marquez (9th Cir. 1985), 772 F.2d 552, 555, cert. denied, 106 S.Ct. 1502 (1986)

> would be termed timely under the federal rule, the trial court would still have discretion to deny the motion if it considered it entered for the purpose of delay. This differs little as a practical matter from the standard we set out in Windham, supra, 19 Cal.3d 121, except that we place the burden on the defendant to explain his delay when he makes the motion as late as defendant did here. To the extent that there is a difference between the federal rule and the California rule, we find the federal rule too rigid in circumscribing the discretion of the trial court and adhere to the California rule. (See also People v. Moore (1988) 47 Cal.3d 63, 80-81 [252 Cal.Rptr. 494, 762 P.2d 1218].)

People v. Burton, supra., 48 Cal.3d 843, 854, 258 Cal.Rptr. 184 190-191 (1989), (Emphasis added; fn. omitted.)

Moreover, in ruling against the defendant, the Burton court found that the trial court had inquired into his dissatisfaction with his counsel, and the defendant's need for a continuance. "The court gave defendant unlimited opportunity to explain why he felt he should represent himself." Id., p. 854, 191. This is quite contrary to the facts herein, where the court made no inquiry at all of the Respondent, having obviously determined that no matter what the reason for a continuance, it would not be granted.

The California Supreme Court, in People v. Windham, supra., 19 Cal.3d 121 [137 Cal.Rptr. 8, 560 P.2d 1187][6], set forth a procedure for assessing an untimely motion:

> When such a midtrial request for self-representation is presented the trial court shall inquire sua sponte into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is latter required. Among the factors to be considered by the court in assessing such request made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record on such relevant considerations, the court should exercise its discretion and rule on the defendant's request.

(People v. Windham, supra., 19 Cal.3d 121, 128-129, 137 Cal.Rptr. 8, 12-13, 560 P.2d 1187.)

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6. Although cited by Burton, the Windham situation is quite different in that the defendant in Windham did not seek self-representation until after his trial had commenced and just before the start of the third and final day of testimony.

It is obvious that the trial court itself in the instant case failed to follow the California rule, because it made no inquiry at all. Such was the case in People v. Hernandez (1985) 163 C.A.3d 645, 209 Cal.Rptr. 809, where the California Court of Appeal solved the problem by appointing a referee whose inquiry established that there was no abuse of discretion. Id., 653-655, 814-815. In essence, that's exactly what happened in the instant case, except that the referee (the Magistrate) was appointed by the U.S. District Court, and his findings, adopted by that Court and by the 9th Circuit Court of Appeals as well, were that in this case the trial court did abuse its discretion in denying the Respondent's motion for self-representation.

In People v. Herrera (1980) 104 C.A.3d 167, 163 Cal.Rptr. 435, the California Court of Appeals held that a motion for self-representation made on the day of trial was not untimely. Id., pp. 174-175, 440. "To hold a motion for self-representation made by a defendant at his earliest opportunity is untimely when that 'earliest opportunity' appears to be shortly before trial, would effectively thwart defendant's constitutional right to proceed in propria persona as established in Faretta v. California (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]." Id., p. 174, 440, (fn. omitted). Of course, in that case there was no motion for a continuance. Id., p. 174, 440. Nevertheless, a Windham inquiry by the trial court herein should have demonstrated to that court, as an inquiry did demonstrate to the U.S. District Court and the 9th Circuit Court of Appeals, that the motion for a continuance was justified.

In short, a proper exercise of the California rule by the trial court would have led to the same result as that achieved by the federal courts, and there is no need for this Court to intervene.

Petitioner also cites cases from other jurisdictions to support his assertion that certiorari in the instant case is necessary, but none support this premise.

In State v. Garcia, 92 Wash.2d 647 [600 P.2d 1010, 1015] (1979), the court found that a self-representation motion had

not been made, and therefore the issue of its timeliness needn't arise. Nevertheless, in dicta, the court stated that if the motion is made shortly before trial, its resolution depends on the facts with "a measure of discretion" in the trial court. Id., p. 1015.

In Williams v. State, 655 P.2d 273 (Wyo. 1982), a self-representation motion made the day before trial was held not to be timely, but the trial court adequately considered the relevant factors, such as the appointed attorney's skill and judgment, and the fact that the defendant's request for a 60 day continuance would have caused disruption of the judicial process because he was being tried jointly with another defendant. Id., p. 277.

In State v. Kender, 21 Wash.App. 622 [587 P.2d 551] (1978) a motion for a continuance in order for a defendant to represent himself as co-counsel with his appointed attorney was denied because the record failed to disclose any disagreement with his counsel or a reason for a continuance. Id., p. 554.

In State v. Herron, 736 S.W.2d 447 (Mo. 1987) the court, after detailed factual inquiry to determine appellant's competence to proceed pro se, determined that the request was made strictly for the purpose of delaying the proceedings. Id., p. 449.

Finally, the Eighth Circuit decision cited by Petitioner, Parton v. Wyrick, 704 F.2d 415 (8th Cir. 1983) examined a Missouri state trial which occurred before Faretta v. California, and therefore applied Missouri law as it existed pre-Faretta to decide the self-representation issue. Nevertheless, in dicta, the Parton court stated, without analysis, that even post-Faretta the trial court had acted within its discretion in denying the motion for self-representation made on the morning of trial. Id., p. 417. Of course, although the defendant's motion to disqualify his attorney was made prior to jury selection, the actual motion for self-representation was not made until after the jury had been sworn, Id., p. 416, and would have been untimely under the 9th Circuit's decisions as well.

See Armant v. Marquez (9th Cir. 1985), supra., 772 F.2d 552, cert. denied, 106 S.Ct. 1502 (1986), Fritz v. Spalding (9th Cir. 1982), supra. 682 F.2d 782.

II

A HEARING IS NOT NECESSARY TO RESOLVE CONFLICTS BETWEEN THE NINTH CIRCUIT DECISION AND THIS COURT'S DECISIONS MANDATING THAT STATE DEFENDANTS MUST FOLLOW STATE PROCEDURES

Citing Teague v. Lane, 489 U.S. ___, L.Ed.2d 334, 109 S.Ct. 1060 (1989), the Petitioner argues that a hearing is necessary to resolve conflicts between the Ninth Circuit decision herein and this Court's decisions mandating that state defendants must follow state procedures. No hearing is necessary, however, because the Respondent did not fail to follow state procedures for timely invocation of his right to self-representation. The relevant state procedures are set forth in People v. Windham, supra., as quoted on p. 7 above. It is clear from the record below that it was the trial court, not the Respondent, which failed to follow procedures. Windham requires a sua sponte inquiry into the factors cited to permit the court to exercise its sound discretion, but all the trial court in the instant case did was to summarily deny the Respondent his right to self-representation based on the court's aversion to granting him a continuance:

> THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case. [C.T. 3, Emphasis added.]

The court never inquired into Respondent's reason for wanting to represent himself or for a continuance. In a sworn statement, "Petitioner's Response to Courts Inquiries of September 9, 1985," supplied to the magistrate in the District Court, Respondent made it clear that the reason he wanted to represent himself and to obtain a continuance was because his attorney had failed to subpoena two necessary witnesses, which Respondent only learned the day he made his motion. These

representations were relied upon by the magistrate. (See Petition, Appendix E, pp. 84-85.) The trial judge would have learned this, too, if only he had inquired.

Moreover, the trial court was discriminatory in its aversion to granting a continuance. Neither attorney was ready to proceed on the date set for trial. Mr. Goldstein was already in trial on another case, and Mr. Mason, the Deputy D.A., didn't know if he had his witnesses and asked to trail the case (Aug. R.T. 3, lines 26-27). Neither attorney answered "ready," as the court was attempting to compel the Respondent to do, and Mr. Mason ended the session by warning the court that "We are not going to select the jury until we have assurances that all witnesses are available." (Aug. R.T. 4, lines 18-19.) The trial did not start until seven days after the Respondent's motion for self-representation was denied. We can't know if, with the benefit of direct access to a court-appointed investigator, the Respondent operating pro se would not have been able to get his witnesses during this seven day delay and been able to answer "ready" on the date the trial actually commenced.

Finally, in Teague v. Lane, supra, the defendant sought to raise the relevant issue for the first time in the federal habeas proceeding, and this Court held he had thereby waived it. Id., at. pp. ___, 347-348, ___. The Court thereby distinguished the situation from that in Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308, 109 S.Ct. ___, and in so distinguishing affirmed that "'a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar.'" Teague v. Lane, supra., 489 U.S. ___, 103 L.Ed.2d 334, 348, 109 S.Ct. 1060, ___ (1989).

The denial of Respondent's motion for self-representation was raised in the state appeal, and the failure of the trial court to follow state procedures was discussed in Respondent's state appellate briefs. (See Appendix 1 [Pertinent portions of

Respondent's "Appellant's Opening Brief" in the California Court of Appeal] and Appendix 2 [Pertinent portions of Respondent's "Appellant's Reply Brief" in the California Court of Appeal].) The California Court of Appeal did not "clearly and expressly state[] that its judgment rests on a state procedural bar," but rather decided against Respondent on the merits. No procedural default on the issue was raised at all by the California Court of Appeal. (See Petition, Appendix F, p. 101.) Petitioner's reliance, therefore, on Teague v. Lane, supra., 489 U.S. ___, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989) is misplaced.

III

THE STATE TRIAL RECORD
IS SO INCOMPLETE AND CONFUSING
THAT THIS WOULD BE A VERY POOR CASE
THROUGH WHICH TO ANNOUNCE ANY RULE

Petitioner complains that the 9th Circuit's interpretation of what is and is not a timely Faretta motion "is a recurring issue," (Petition, pp. 18-19) and, therefore, even though the opinion in the instant case is not published and is of no precedental value, the issuance of a Writ of Certiorari is necessary. Respondent's reply is that if the issue is as burning as the Petitioner would have us believe, there must be a case which is a better vehicle than the instant one to deal with it. This trial court record is confused. As above stated, although the court demanded that the Respondent answer "ready" to enjoy the right of self-representation, neither attorney was required to so state. In fact, a continuance of seven days was granted to the attorneys. And, of course, the court failed to conduct the Windham inquiry mandated by the California Supreme Court.

In addition, although the 9th Circuit found that there was an inextricable linkage between the request for self-representation and the motion for a continuance (Petition, Appendix A, p. 36), Respondent disagrees. At no time was the Faretta motion conditioned upon the granting of a continuance motion. When the court first advised the Respondent that it would grant his motion conditioned upon the case proceeding to

trial that day, the Respondent answered, "Thank you." (Aug. R.T. 1-2, lines 24-9.) When asked again by the court if he understood that if he represented himself the matter would proceed that day, the Respondent replied "Yes, Your Honor." (Aug. R.T. 2-3, lines 27-4). At this point the court inquired if he were "ready" to proceed that day, and the Respondent replied negatively (Aug. R.T. 3, lines 5-6). To be "ready" is not the same as to be "willing" to proceed. The court never asked if he were willing, only ready. When the court advised the Respondent that he could not represent himself based on this response, the Respondent pointed out to the court that he was merely replying to the court's question, and thus not demanding a continuance (Aug. R.T. 3, lines 8 9). It was only when the court again conditioned the Respondent's self-representation right on his answering ready that the issue of a continuance came up and the self-representation issue became sidetracked. A fair reading of the record reveals that the Respondent would have proceeded pro se without a continuance if that were required by the court. (Under the circumstances, the court's denial of a continuance was a separate abuse of discretion.) Every trial lawyer knows that courts have compelled attorneys to proceed with their cases, even when they have not answered ready. To require the Respondent to assure the court of his preparedness, as opposed to his willingness, to represent himself was unfair and discriminatory. Of course, as Armant v. Marquez, supra., 772 F.2d 552, 558, held, if he were unprepared through no fault of his own, and if his motion was timely under all the circumstances, a continuance to permit a meaningful exercise of the right of self-representation was in order.

The adage says that bad facts make bad law. This case presents bad facts. In the absence of publication, it has no bearing on anyone other than the Respondent and Petitioner. If this Court is inclined to accept the Petitioner's invitation to make a pronouncement on the issue of a timely Faretta motion, and if the cases are as numerous as he asserts, the Respondent suggests it would be advisable to await a case where the issue

is more clearly and squarely presented.

Finally, regardless of allegedly divergent state and federal rules, the 9th Circuit seems to have applied California's "Sound Discretion/Windham" Rule in this case rather than its own "Timely Before Jury Selection Per Se Rule." Indeed, the Court of Appeals found that the trial court abused its discretion in denying a continuance to Respondent, with constitutional ramifications. Clearly, the analysis engaged in by both the District Court and the Court of Appeals, coupled with the Court of Appeals' refusal to affirm the granting of the conditional writ of habeas corpus strictly on the basis of the Faretta error (announced in its first memorandum opinion; Petition, Appendix A, p. 38) alone evidences the exercise of the same sort of analysis mandated by the California Supreme Court for California trial courts in Windham. Therefore, no matter the rule applied, the Petitioner has suffered no prejudice.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Habeas Corpus should be denied.

Dated: November 19, 1989

Respectfully submitted,

Saul M. Ferster
Attorney for Respondent

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DWIGHT MARTIN, Defendant and Appellant.	2d Crim. 40292

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE EVERETT E. RICKS, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

ROSANA M. SELESNICK
Attorney at Law
16311 Ventura Boulevard
Suite 1050
Encino, California 91436
Telephone: (213) 784-4373

Attorney for Defendant
and Appellant

was not a model of clarity and that it was up to counsel as to whether sentence should be made now or a report should be awaited. Magee's counsel stated that it would take at least three weeks for a report and that "we are willing that judgment be pronounced today." ... The court then held, 'This action constituted a withdrawal of the application for probation and a waiver of the requirement that a probation report be had before sentence. Under the circumstances there was no error in the court's proceeding to sentence without a probation report..."

The case at bench can be distinguished from the above-cited cases as there was no plea bargain, and appellent's waiver was against the advice of counsel. Appellant contends that the mandatory language of §1203(b) requires the court to obtain a probation report in every felony case because this report assists the court in determining an appropriate disposition after conviction and insures that important rights are not denied to any person convicted of a felony. Appellant also contends that, in any case, appellant's waiver against his counsel's advice, did not work a withdrawal of the required report, and the record clearly demonstrates that the court was aware of defense counsel's opposition.

III.

THE TRIAL COURT ERRED IN FAILING TO ALLOW APPELLANT TO REPRESENT HIMSELF

A hearing was held on April 28, 1981, and is contained in the Reporter's Augmented Transcript [hereinafter "RAT"], a 4-page volume which was augmented to this record on appeal. At the hearing, the following occurred:

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"MR. GOLDSTEIN: Your Honor, I'd indicate for the record that I had a discussion with [appellant] this morning earlier. Today is the day set for trial. He has indicated a desire to represent himself in this matter. I will indicate to the court that I explained to him the hazards of so doing. It is a 187. But it is [appellant's] desire to represent himself in this matter.

"THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will accomodate you.

"THE DEFENDANT: Thank you, Your Honor.

"THE COURT: But I want you to understand that we will proceed to trial in this matter today. If you want to try to represent yourself, you are welcome to do it, but I think you are a complete idiot. I will not give you one hand whatsoever. ...

"THE COURT: ... As far as I am concerned, you will absolutely be commiting suicide, but that will be up to you.

"THE DEFENDANT: Thank you.

"MR. GOLDSTEIN: Your Honor, may I indicate that I am currently engaged in Department 121. Because of that, I didn't feel this matter would go to trial today. I have advised [appellant] that I will bring him my entire file--if that's his desire--I will bring it to him tomorrow. What I am indicating is I don't have the file with me today, and I think [appellant] would need that file. I probably could arrange to have it for him today. I could have it brought down, whatever the court's desire is.

"THE COURT: I assume he wouldn't need the file to select the jury today and give it to him tomorrow. I think he is completely insane to do it.

"MR. MASON: I don't understand counsel. Today is the

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date of trial. He didn't bring the file with him.

"MR. GOLDSTEIN: As I indicated, I am engaged in a jury trial. I am giving my closing argument at 10 o'clock.

"THE COURT: [appellant], do you fully understand now that this matter is ready to proceed today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do.?

"THE DEFENDANT: Yes, Your Honor.

"THE COURT: Are you ready to proceed today?

"THE DEFENDANT: No, I am not.

"THE COURT: Well, I am not going to continue the case.

"THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

"THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent to continuing this case.

"THE DEFENDANT: I am letting the court know I like to represent myself.

"THE COURT: If you are ready to proceed to trial today, you can represent yourself --

"THE DEFENDANT: I was ready in December. When the Peple wasn't ready, I gave the People time. Now, why can't the people give me time?

"THE COURT: I have no intent of giving you any time. This case goes back to May 30th, 1980. It has been a year, I have no --

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"THE DEFENDANT: It has not been a year. I have been in custody for seven months.

"MR. MASON: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

"THE COURT: Well, the matter will simply trail, Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

"MR. GOLDSTEIN: It should be over by Wednesday. . . .

"MR. MASON: Trail this until Wednesday --

"MR. GOLDSTEIN: Could that trail--I'm sorry--until Thursday, Your Honor? . . .

"THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

"MR. MASON: We are not going to select the jury until we have assurances that all the witnesses are available.

"THE COURT: All right. The matter will go on trailing status then. Thank you very much." (RAT-1-4).

Appellant contends that the above-stated record reveals that, although the court fully intended to "trail" the matter, it denied appellant his request for a "continuance." Although the court may have utilized the linguistic differences in what it felt were appellant's best interests, nevertheless, this

interferred with a right of constitutional dimension. To phrase appellent's argument as simply as possible, if a court is intending to trail a matter anyway, why not offer this time to a defendant who wishes to represent himself but is simply not ready to proceed on THAT day (prior to the intended trailing.)

Clearly, appellant did not know the difference between trailing and continuance and yet, for appellant's purposes, they were one and the same. It should be recalled that appellant stated that he wanted to represent himself and that he was not ready to proceed "today." Instead of the court asking appellant if he would be ready to proceed in a few days on this trailing case, it demanded that appellant be ready to start today and that he would not be granted a "continuance." However, the record is clear that (1) the defense counsel required that the matter be trailed; (2) the prosecutor asked the matter be trailed for a few days so he could do a witness check (RAT-3) and this was known to the court before it made the finding that appellant's motion was untimely; and immediately after making the finding, the prosecutor stated that he was not going to select the jury until he had assurances that all witnesses were available -- to which the court replied, "All right. The matter will go on trailing status then."

Faretta v. California, 422 U.S. 806 (1975), established that a defendant competent to waive counsel has an affirmative right to represent himself. In People v. Windham, 19 Cal.3d 121, 127, 137 Cal.Rptr.8 (1977), the California Supreme Court held "that in order to invoke the constitutional mandated unconditional right of self-representation a defendant in a criminal

trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.[5]"

Footnote 5 of Windham, explains the Court's meaning of "reasonable time" as follows:

"[5]Our imposition of a "reasonable time" requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the Faretta mandate as a means to unjustfiably delay a scheduled trial or to obstruct the orderly administration of justice. For example, a defendant should not be permitted to wait until the day preceeding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request. In such a case the motion for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation. Thus if the reason why a defendant makes a request for self-representation in close proximity to trial is because he disagrees with his appointed counsel's desire for a continuance, some delay may be necessary whether or not the defendant's motion is granted. In such a case the very reason underlying the request for self-representation supplies a reasonable justification for the delayed motion. Furthermore, as defense counsel himself seeks a continuance for the purpose of further trial preparation it would be illogical to deny a motion for self-representation

under such circumstances simply because the motion is made in close proximity to trial. There may be other situations in which a request for self-representation in close proximity to trial can be justified. When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly process of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard."

Appellant's attorney was not ready to proceed, and had not even brought the file with him. Appellant's attorney wanted the matter to "trail," and the prosecutor wanted it to "trail." The court was very willing to let the case trail four or five days, but was unwilling to give appellant a "continuance." There is nothing on this record to indicate that appellant was seeking to delay the orderly process of justice. He merely said that he was not ready to proceed today -- and apparently no one else was prepared to proceed today either. Appellant, apparently unaware of the difference between trailing and continuance may have believed that during trailing, he would have to pick a jury and do other things that he was not prepared to do that day. In reality, nothing was going to happen until the defense counsel finished the other case and the prosecutor could do a witness check. Appellant contends that under the reasoning of Windham, his constitutionally based right of self-representation was violated, even if his choice appeared to be unwise and could very well lead to detrimental consequences.

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As explained in Ferrell v. Superior Court, 20 Cal.3d 888, 891, 576 P.2d 93, 144 Cal.Rptr. 610 (1978), "A defendant in a criminal proceeding has a federal constitutional right to represent himself without counsel if, upon timely motion ..., the trial court determines that he voluntarily and intelligently elects to do so ... If these conditions are satisfied, the trial court must permit an accused to represent without regard to the apparent lack of wisdom of such a choice and even though the accused may conduct his own defense ultimately to his own detriment." People v. Teron, 23 Cal.3d 103, 588 P.2d 773, 151 Cal.Rptr. 633 (1979).

CONCLUSION

The court below erred in denying appellant's motion for clergyman-penitent privilege; erred in permitting appellant to waive the compilation of a probation report against the advise of counsel; and erred in denying appellant his constitutional right of self-representation.

For the above reasons, it is respectfully urged that this Court reverse the judgment of the court below.

Dated: February 15, 1983.

Respectfully submitted,

Rosana M. Selesnick

ROSANA M. SELESNICK
Attorney for Appellant

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APPENDIX 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DWIGHT MARTIN, Defendant and Appellant.	2d Crim. 40292

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE EVERETT E. RICKS, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

ROSANA M. SELESNICK
Attorney at Law
16311 Ventura Boulevard
Suite 1050
Encino, California 91436
Telephone: (213) 784-4373

Attorney for Defendant
and Appellant

a distinctly different faith than Mr. Hargrew." Appellant urges his relationship with Minister Hargrew, who he called preacher and sought counsel from, was of a religions nature; and request for a Koran further illustrates appellant's religious nature. It is contended that a confidence made to a Catholic priest is a confidential communication even if the person confessing is of another faith. The fact is, there is no evicence on this record as to whether appellant was a Baptist and later became interested in the teachings of the Koran. Appellant's religious beliefs at the time of the incident and subsequent thereto are merely conjecture on the part of Respondent.

Appellant contends that Mr. Hargrew was a licensed minister of the Baptist church and counseled appellant on an on-going basis; the communication at the bus station was made after the ride concluded and appellant was waiting inside the bus station; and appellant's religious affiliation, Baptist or otherwise, is not dispositive of any issues herein.

II.

A PROBATION REPORT WAS REQUIRED

For purposes of this issue, appellant reiterates the arguments made in Appellant's Opening Brief.

III.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S RIGHT OF SELF REPRESENTATION

Appellant's Opening Brief, recited the record which revealed that, although the court fully intended to "trail" the matter, it denied appellant his request for a "continuance." The question presented was, if a court is intending to trail a matter anyway

(3)The length and stage of the proceedings;(4)The disruption and delay which might be expected if the delay were granted;(5)Defendant's proclivity to substitute counsel.

"It is clear from the record the trial court made no attempt to comply with the mandate of the Windham court when it stated: 'When such a ... request for self-representation is presented, the trial court shall inquire sua sponte into the specific factors underlying the request thereby assuring a meaningful record in the event that appellate review is later required.

"Without such a record we can only speculate that a consideration of those factors may well have demonstrated to the trial judge reasons to exercise his discretion to allow Herrera to proceed in propria persona. The record does show Herrera had conceived a well considered defense. At least Herrera felt he was receiving poor representation. The proceedings were obviously very short; a one-day trial after the jury had been sworn two days earlier. The court was unable to proceed on the day of the trial and continued the matter for two days after the jury was sworn. Finally, the record fails to show any past use of this request as a device to continue the trial and in fact apparently Herrera was ready to proceed immediately in that he did not request a continuance of the trial date after stating the motion. Thus, even if the request was untimely, the court failed to consider the motion under

the Windham standards." [Emphasis original].

In the case at bench, both counsel were both technically seeking a continuance in that they wanted the matter trailed to a date certain -- "Could that trail until Thursday, your Honor." Permitting appellant to represent himself on that Thursday would not have obstructed the orderly administration of justice, and thus appellant's motion was not untimely.

The court did not inquire into specific factors underlying the request and did not make a meaningful record. Even if, arguendo, the request was untimely, the court failed to consider the motion under Windham standards. The court was unable to proceed on the day of trial and should have offered appellant this time. It was illogical to deny the motion for self-representation under such circumstances simply because the motion was made in close proximity to trial. People v. Windham, supra at footnote 5.

CONCLUSION

The clergyman-penitent privilege was applicable to the privileged communication made by appellant to Minister Hargrew; a probation report was required for proper sentencing; and appellant was improperly denied his right of self representation, even if his request could be considered untimely.

For the above reasons, it is respectfully urged that the Court reverse the judgment of the court below.

Dated: May 2, 1983.

Respectfully submitted,

Rosana M. Selesnick

ROSANA M. SELESNICK, Attorney for Appellant

PROOF OF SERVICE BY MAIL

I, Saul M. Ferster, declare:

I am a citizen of the United States and am employed in Los Angeles, California. I am over the age of 18 years and am not a party to the action named in the attached document. My business address is 1880 Century Park East, Suite 304, Los Angeles, California 90067. On November 20, 1989, I served a copy of the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the Petitioner by placing a true copy thereof in an envelope sealed with postage thereon fully prepaid in the United States mail in Los Angeles, California, addressed as follows:

John K. Van De Kamp, Attorney General
Donald F. Roeschke, Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on November 20, 1989.

SAUL M. FERSTER